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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 152.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y., Plaintiff in Error,

vs.

BRIGHT WILLIAMSON, Defendant in Error.

BRIEF FOR BRIGHT WILLIAMSON, DEFENDANT IN ERROR.

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Attorney for Defendant in Error.

CHARLESTON, S. C.
Walker, Evans & Cogswell Co., Printers
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1903.

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vs.

BRIGHT WILLIAMSON, Defendant in Error.

In Error to Supreme Court of South Carolina.

STATEMENT OF CASE.

The defendant in error, Bright Williamson, on the 28th day of January, 1891, applied for and on the 2nd February, 1891, received twenty-five shares of the defendant Company, a Building and Loan Association, incorporated under the laws of New York and having its chief place of business in Syracuse, N. Y., and doing business in Darlington, S. C., through a local board. At that time also it had a special agent, Samuel Carpenter, at Darlington, and upon his representations (made orally and by "Printed Literature") Williamson was induced to take the shares.

In the certificate of shares the Association "agrees to pay said shareholder * * the sum of one hundred dollars for each of said shares at the end of seventy-eight months from the date hereof." (s. p. 35.)

The "Printed Literature" at that time circulated by Carpenter as special agent of the Company and by him given to Williamson gave the same assurance, e. g.

"This Association has no auction sales; no bidding for loans, and a definite time for repaying a loan. s. p. 16. * * The only association making a definite contract in every respect. Stock matures in seventy eight months. Borrowers know the *exact* amount to cancel their mortgages." s. p. 17.

"In the past twenty-two months it accumulated a surplus of $1,890 78-100 over and above the earnings necessary to mature the stock in six and a half years." (s. p. 27.)

January, 1892, again $1,890 78-100. (s. p. 27.)

March, 1892—$2,203. (s. p. 27.)

March, 1893—"These 22 months have been more productive than the 26 preceding" (s. p. 28) and so on through the 6½ years that Williamson's stock ran (s. p. 28–29.)

This case has been twice before the Supreme Court of South Carolina: November Term, 1898, reported in 54 S. C. p. 582, and November Term, 1900, not yet reported on account of this appeal. This decree however will be found at page 94 of the present record. On the first appeal the Supreme Court of South Carolina decided:

"(1) That the proper construction of the contract between the parties was that contended for by the plaintiff (Williamson) and not that contended for by the defendant, viz: (that the shares matured at a fixed and definite term, 54 S. C. p. 504.)

"(2) That the contention that because the defendant has no money in its treasury applicable to the claim of the plaintiff (Williamson,) did not defeat the plaintiff's cause of action.

"(3) That the position taken by the defendant (The Eastern B. & L. Association) that the contract if construed to be a contract fixing a definite time for the maturity of the shares would be *ultra vires* could not be sustained." s. p. 145.

(4) That on this second appeal the only question left open was: "But the question whether the plaintiff (Williamson) had waived his right to insist upon his contract, as originally made,

by becoming a borrower some time after the plaintiff had received the certificates for the 25 shares, the par value of which he is now claiming, was left open, and that as it seems to us is the only question which is now open."

The plaintiff in error before the Supreme Court of South Carolina contended (Record p. 95) that the former decree of 18th April, 1899, was not conclusive, sed curia: "An examination of the record of the case before the Court at the time of the former hearing will show that this is a mistake, except so far as the answer is concerned; and that, being merely a statement in legal form of the grounds of defense, throws no more light upon the questions involved than the facts which were then before the Court afforded. An examination of the opinion of the Court in the former decision will show that the Court then had before it the terms of the certificates of shares, the 'literature' of the Association, that is, the printed circulars and leaflets issued by the Association, the express promises made by the duly authorized agents of the defendant, the fact that the plaintiff had effected a loan from the defendant, the charter and by-laws of the Association, and the fact that the defendant did not have in its treasury at the time when the shares matured (as contended by the plaintiff) the money applicable to plaintiff's claim, and that all these matters were considered and passed upon by the Court under the former appeal, except the question of waiver as above stated."

Again, "Exceptions 3, 4, 5, 6, 7, and 8, all impute error to the Circuit Judge in refusing to charge the several requests therein repeated, in reference to whether this was a New York contract, to be construed according to the laws of that State. These questions were distinctly made under the former appeal, as is shown by the points and authorities of counsel for defendant under the former appeal at page 589 of 54th S. C., above cited, and therefore cannot be renewed here. These exceptions are overruled."

The only part of the case decided in this second case was that of waiver by the defendant in error, and as the Court decided the question against the plaintiff in error the appeal was dismissed.

By the way of defence the plaintiff in error put in evidence its charter, certain Acts of the Legislature of New York and certain decisions of its Courts and asked the Court to make certain charges which are set out in the record.

LAW.

(1) MOTION TO DISMISS.

The defendant in error moves to dismiss this writ of error on the ground that the case was rested by the Court below on an estoppel of the plaintiff in error; that this ground was one independent of the Federal question and sufficient to sustain the decision; that the decision of the Federal question is not necessary to the disposition of this writ of error and that this Court is without jurisdiction of the writ of error.

ARGUMENT ON MOTION TO DISMISS.

The Court charged that the certificates of stock and other matters that enter into the contract are to be taken in connection with whatever representations in addition to those matters were actually made, at the time the contract was entered into and if it did make such representations which led to the making of a different contract from that expressed in its by-laws and charter, that such special contract was to govern rather than that expressed by its by-laws and charter. So the first question was: Did this Association induce the defendant in error by its literature or by verbal representations or any representations in addition to those contained in its certificates of stock and by-laws and other matters mentioned in the certificates, to enter into this contract; whether it intended him to believe that it was a contract for a "limited number of payments, &c." s. p. 134.

It will have been seen from the foregoing statement that the point of estoppel was the controlling one in the case. Much of the evidence at the trial was directed to it and the trial court in unequivocal terms charged that if the jury believed that Williamson had been mislead as to the effect of his contract by the representations of the plaintiff in error's agent, the jury could

find the contract to have been what the agent represented it to be.

The Supreme Court of South Carolina took the same view of the law. (Rec. s. p. 145.)

This case therefore as regards the jurisdiction of this Court comes within the principle of numerous cases decided by it in which it has refused to consider the Federal question where there is an independent ground in the case, on which it was rested.

The determination by a State Court of a Federal question adversely to plaintiff in error will not sustain the jurisdiction of the Supreme Court of the United States, if another question, not Federal, was also raised and decided against him and the decision thereof is sufficient, notwithstanding the Federal question to sustain the judgment.

The rule is thus tersely stated in Hammond vs. Johnston, 142 U. S. p. 78, by Chief Justice Fuller:

"It is well settled that when the Supreme Court of a State decides a Federal question in rendering a judgment and also decides against the plaintiff in error upon an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question. Hopkins vs. McLean, 133 U. S., 380, Hale vs Akers 132 U. S. 554, Henderson Bridge Co. vs. Henderson City 141 U. S. 679."

Hale vs. Akers adds a large number of Supreme Court decisions to the above in an elaborate decree by Judge Blatchford.

See also Rutland R. R. Co. vs. Central Vermont R. R. 159 U. S. 641 and Hammond vs. Horton 169 U. S. 732.

Harrison vs. Morton, 171 U. S., 39.
Castillo vs. McConnice, 168 U. S., 674.
Bacon vs. Texas, 163 U. S., 207.
Egan vs. Hart, 165 U. S., 188.

Michigan vs. Flint, &c., R. R. Co., 152 U. S., p. 368, is very close to the present case, if not on "all fours" with it. There was a Federal question involved, as the State of Michigan claimed the land in question under a grant from the United

States. On a motion to dismiss : *Curia* "The Supreme Court of Michigan held that the State might be *estopped* by its acts, conduct, silence and acquiescence; that the only question necessary to be considered and determined was the question of estoppel; and after a full consideration of the facts applicable to this branch of the case, reached the conclusion that the claim of the State had no foundation in equity, justice or good conscience; and that it had become stale, and that the State was *estopped* to assert title in itself to the lands in question. As its judgment thus rested upon a decision of a question which was not Federal, this Court has no jurisdiction to review it, and the writ of error must be dismissed.

Adams County vs. Burlington and Missouri R. R., 112 U. S., 123."

The Court will not, in the case stated, enquire into the soundness of the decision on such other matter or issue.

Murdock vs. The City of Memphis, 20 Wall., 590.

Again : It is not a Federal question that the Court of a State refuses to follow the law of another State.

Terry vs. Davy, 107 Fed. Rep., p. 51.

Glenn vs. Garth, 147 U. S., p. 367.

In the last case, p. 367. *Curia:* "It is contended that the New York Courts did not give to the Statutes and jurisprudence of Virginia, and to the judicial proceedings in Virginia, the faith, credit and effect that they had by the law and usage at home * * * nor were the validity and effect of the Statutes of Virginia *denied* although so far as relied on, their proper construction and operation were considered by the Court of Appeals. * * * The distinction (p. 369) between the construction of a Statute and the validity of a Statute has frequently been adverted to by this Court." (Cases cited and jurisdiction denied.)

Mining Co. vs. Boggs, 3 Wall., 310.

"However that may be, there was no decision of the Court against the validity of such a license. The decision was, that

no such license existed; and this was a finding by the Court of a question of fact upon the submission of the whole case by the parties, rather than a judgment upon a question of law."

In Mallett vs. North Carolina, 181 U. S., p. 592.

Curia. "In the present case, as already stated, the Supreme Court of North Carolina did not refuse to consider the Federal questions raised in the petition, but disposed of them in an opinion found in the record. (State vs. Mallett, 125 N. C., 718.) Had that Court declined to pass on the Federal questions, and dismissed the petition without considering them, we certainly would not undertake to revise their action."

In this case the South Carolina Court decided, not that the Statutes and Laws of New York were invalid, but only that they were "inapplicable." (s. p. 138.)

It is not enough merely to claim the existence of a Federal Question. New Orleans vs Louisiana 185 U.S. 344

That the decision in this case in the South Carolina Court was based on estoppel, is made clearer by the South Carolina decisions themselves.

In Equitable B. and L, Association (a Georgia corporation) vs. Vance, 49 S. C., p. 407, (1897) a unanimous Court by Benet, A. A. J., says :

"The leading questions raised by the pleadings and the exceptions are : 1. Was the contract to be performed in Georgia, or in this State ? 2. Was the contract usurious ? The issue as to the place of performance is a mixed question of law and fact. The Circuit Judge reached the conclusion that the parties to the contract intended that it should be performed in Georgia. In this, after carefully considering the testimony, we can find no error. After thus concluding it followed, as a matter of course, that the defense of usury would fail, because it is laid down in the law of Georgia, that no fines, interest or premiums paid on loans, in any Building and Loan Association, shall be deemed usurious.' "

This doctrine has been reaffirmed in :

Hoffman's case, 50 S. C., 308.

Turner's case, 51 S. C., 33.

Pollock's case, 51 S. C., 420.
Tobin vs. McNab, 53 S. C., 73.
Carpenter vs. Lewis, 60 S. C., 35.

ON THE MERITS.

To recur to the decision of the Supreme Court of South Carolina. Its decision is based on three grounds :

1st. That it was *res judicata* on three points.

a. The proper construction of the contract (estoppel).

b. That because the defendant had no money in its treasury, did not defeat plaintiff's cause of action.

c. That the contention of the Association that if it did make a contract for a fixed definite time, it would be *ultra vires,* could not be sustained, and that all these questions had been decided in the previous case, and could not be reopened.

This decree was filed April 10th, 1899.

1st. Was the decree of 1899, of the South Carolina Court, *res judicata ?*

The Supreme Court of South Carolina has decided that it was (s. p. 146-147), and there is no assignment of error on this point.

It is very true that the first decree was on an interlocutory motion to dissolve an attachment. But

The subject matter was the same.

The parties were the same.

The precise points were raised.

Record, s. p. 145-146.

Williamson vs. Association, 54 S. C., pp. 584-585-588

Hart vs. Bates, 17 S. C., 40.

Freeman on Judgments, par. 252.

"Defences and causes of action once presented and considered cannot be again asserted in another suit without the violation of the principle of *res adjudicata.*"

"It is true that the doctrine of *res adjudicata* does not apply to *mere* interlocutory orders made in the ordinary progress of the case. In such orders, granted or refused upon summary application, it has been held that they are not so far conclusive as to prevent the same matter being drawn in question again in the regular form of a suit. But the reason of that rule does not apply where the matter, conclusive and final in its character, is gravely discussed, and the decision is appealable."

(Freeman on Judgments, par. 284.)

Surely if the first decree of the Supreme Court of South Carolina was so final and conclusive as to be *res adjudicata,* it was also appealable. It is now over two years since it was made.

We submit the point.

In McGourkey vs. Toledo and O. Ry., 146 U. S., 544-545, this Court says :

"Probably no question of equity practice has been the subject of more frequent discussion in this Court than the finality of decrees. * * * The cases, it must be conceded, are not altogether harmonious."

2d. The case itself.

The Association claims :

(1) That it was incorporated 1st March, 1890, under the Act of 1851 (Chap. 122), New York Laws.

(2) That the $100 on each share was payable at the end of 78 months, only according to the provisions of the Act of 1851, as interpreted by the New York Court, in the case of O'Mally v. Peoples B. and L. and S. Association, only at maturity; and that the 78 months were only an estimated period of its maturity.

(3) That Williamson's stock at the end of the 78 months had not matured—was not worth $100 per share. The Association denies also that the $937.50 is a set off, and claims that the shares cannot now be withdrawn, as they have been pledged.

The case of O'Mally v. Peoples B. and L. and S. Association, Mr. Pierce testifies, gave the law of New York, as existing since 1851. This Association was incorporated in 1890. Mr. Pierce is its General Attorney, and one of its Directors, and has been such since 1890. He is "familiar with the Laws of the State of New York regarding Building and Loan Associations; he has made said laws a special study in his relations to the Association as its General Attorney; my duties as such having practically taken all my time during a number of years past" (s. p. 64). He says that the assured 78 payments are only an estimated period.

With this perfect knowledge of the law, the defendant Association in 1891 put out through its printed literature (by which it acknowledges itself bound) that it is the *"only* Association making definite contract in every particular," * * * "giving a definite maturity contract." * * * "Stock matures in 78 months." It iterates, and reiterates this, not only by its other "printed literature," but also through Carpenter, whom, by special telegram, it recognizes as its Special Agent, with whom Williamson and others can deal "safely" (s. p. 18). Through Pooler, *et id omne genus.*

By these representations and assurances, it induced Williamson to subscribe for its stock.

What did Williamson know?

He was aware, by the "printed literature" circulated in the community of Darlington, of which he was a member, and specifically given to him, of the assurances and representations as to the definite maturity contract, etc., in 78 months. He was ignorant of the laws and decisions of New York on this subject. As a South Carolinian, a non-resident and non-citizen of New York, he was not bound, and could not be assumed to

know them. He was ignorant of the Charter and By-Laws of the Association (s. p. 33; s. p. 14–18).

On these representations, etc., and induced by Carpenter, he applies for stock.

The application (Ex. A, s. p. 33-34,) besides the printed literature, and Carpenter's representations, is, up to this time, the only thing shown to him. In it he agrees "to abide the terms, conditions and By-Laws referred to in the certificate of shares." But they are not shown to him. He knows them only as they have been represented to him by officers of the Association bound to know them, as stipulating that at the end of 78 monthly payments he will be entitled absolutely to $100 per share—$2,500. On the faith of all this, he applied for the shares, and that there might be to him no "place for repentance,"—having put his hand to the plough, he cannot look back; the application winds up :

"The price of stock MUST accompany this application" (s. p. 34). And it does.

Then he gets his certificate, containing again, on its face, in large type, "Maturing August 1st, 1897," and in the body, and in plain type, the agreement on the part of the Association to pay him "the sum of $100 for each of said shares at the end of 78 months, etc." (s. p. 35.) On the front and back of this certificate, received after the payment of "the price of the stock," are printed the terms, conditions and By-Laws, in small, almost illegible type. These are, then, for the first time, placed in Williamson's possession. Even then, trusting to the representations made to him, and perhaps kept off by the small and almost illegible type, and interminable length of the By-Laws, etc., he did not read them (s. p. 33).

To Carpenter, Pooler, and other officers of the Association, all this was thoroughly known. The conclusion cannot be resisted; that deceit was deliberately practiced.

This is actual fraud. *Dolus malus* of the worst kind. The Association and its officers combine and plot to cheat and defraud Williamson in particular, and an entire community, by conscious falsehoods.

If the statements as to past profits was false, the Association is guilty of fraud. If true, the shares of Williamson are matured, and Williamson is entitled to his money.

Fraud taints and rots everything, the entire mass, it touches, and it is impossible to separate the parts of a transaction tainted with fraud and say this rests on fraud, and this on honest dealing.

Lord Cranworth: "Whenever any one has, by wilful misrepresentation, induced another to part with his rights on the belief that such representations were true, this is in the plainest and most obvious sense a fraud."

Reynell vs. Sprye, 1 D. G. M. and G,, 691.

"Fraud avoids everything that it touches."

Fraser vs. City, 19 S. C., 402.

"If he (the defendant) resorts to unlawful means, and accomplishes a fraudulent purpose, the law will not stop to *measure the force* of such inducements. It is enough that the party was deceived and cheated, and the defendant's falsehood and fraudulent practice contributed to that end."

Sawyer vs. Menominee Building and Loan Association, 61 N. W., (Mich.) p. 523.

"Whenever an agreement or other like transaction has been procured by the means of a fraudulent representation by one of the parties, the other has an *election* of equitable remedies. The injured party may *compel the fraudulent party to* MAKE GOOD HIS REPRESENTATION * * * or he may rescind the agreement and procure the transaction to be completely cancelled and set aside. Such fraudulent misrepresentation, even though it relates only to a portion of a contract, furnishes a complete defence to the enforcement of the whole agreement."

2 Pomeroy Eq. Jur., Sec. 899.

The question involved in this case is a question of actual fraud; a matter of general law, of which every Court judges for itself; it treats the non-citizen just as if he were a citizen.

"All that a nation can therefore be justly required to do is to open its own tribunals to foreigners in the same manner and to

the same extent as they are open to its own subjects, and to give them the redress as to rights and wrongs as it deems fit to acknowledge in its own Municipal Code for natives and residents."

Story Conflicts of Laws, Section 556.

To the same justice that a citizen of South Carolina is entitled is this citizen of New York entitled, and no more. And it has got it. Preconceived and prearranged fraud has met justice. Public policy will not tolerate it anywhere. No more in New York than in South Carolina.

But did the Supreme Court of South Carolina in this case decide differently from that of New York, as plaintiff in error insists?

The following case was used before the South Carolina Court, viz:

Newman vs. N.Y. Mutual Savings and Loan Association, 17 App. Div., 72.

This was an action to redeem a mortgage to the defendant. The defendant, just as the Eastern Building and Loan Association, had put out annually flattering statements of its earnings, some of them made officially to the banking department of New York.

In 1891 the defendant issued a circular, known in this case as "Exhibit No. 18," which contained the following statement, among others:

"Maturity of Shares.—We cannot absolutely fix the time required for maturing shares. But with the rate now obtained for loans, a conservative estimate will place the maturity within 8 years."

The Court found as facts:

"That for the purpose of *inducing* the above named plaintiff to execute and deliver to defendant the bond and mortgage described in the complaint herein, on or about the month of April, 1891, *represented and stated* to plaintiff that he would have only $2,400 to pay on the principal; interest would be only three and one-half to four per cent., and he would *have to pay* on the mortgage *only from six and one-half to seven years,*

because the defendant had made from fifteen to twenty per cent. every year. The plaintiff *believed* such representations to be true, and was *induced* thereby to become a member of the defendant corporation, and a subscriber for twenty-six shares of stock." * * *

"Follett, J. The avowed purpose of this corporation, as disclosed by its articles, require it, its trustees and authorized agents, to exercise the utmost good faith towards all of its borrowing members; and, *in case representations are made respecting existing conditions, or the results of past experience which are untrue, and are relied on by the borrower, he becomes entitled to rescind his contract, upon paying the corporation such a sum as is just and equitable.*" . . .

"The Court found, as before stated, that the defendant *represented that it had made from 15 to 20 per cent. every year.* This was a representation in respect to an existing fact. If it were false, the plaintiff is entitled to rescind his contract."

In the above case the maturity of the shares was specially not "absolutely" fixed; but in this (Williamson's) case, the maturity of shares, both by representation and written contract, was "absolutely" fixed, and by the showing of the Company, the 25 shares of Williamson were fully worth, on the 1st of August, 1897, (the day the 78 months ended) $2,500, and paid his debt of $937.50, and left him a surplus of $1,572.50.

It is, perhaps, well to note here that the case of O'Mally, so much relied on by the defendant, rests in part at least on the ground that any other result "would, in all probability, bankrupt the Association, a result which it would seem must have been *apparent* to the parties when the transaction took place."

No such result was apparent to Mr. Williamson; on the contrary, he denies it without contradiction, and, according to the officers of the Association, compound interest, fines, entrance fees, etc., would prevent any such disaster.

"Paid up stock doubles in six and one-half years," proclaimed the Company to induce membership (s. p. 16).

Moreover, in the O'Mally case, of which only the decree, and not the record, is in evidence, there is no word of represen-

tations, as in Williamson's case, by "printed literature," or by agents, on which estoppel could be based. The only things before the Court were the certificate and the articles of association, by-laws, and terms and conditions printed on the back of the certificate, which made up the contract (s. p. 110), and by these the period of five years, mentioned in the certificate, was construed as simply estimated.

In Lowes case (s. p. 123), the Court expressly excludes the idea of fraud and misconduct. Williamson's case is wholly different. It teems with the fraud of the Association and its officers, certainly of estoppel by their representations, which, if true, conclude the case; and, if false, make such a case of fraud as is found in no other case cited by either side.

There are two cases to which we specially ask the attention of this Court :

(1) International Building and Loan Association v. Bratton, (Ind.) 56 N. E., p. 105.

The mortgage given by Bratton to this Association for a loan, stipulated that the repayment was to be by monthly dues of 75 cents a share; monthly interest, 5 per cent.; monthly premiums, 5 per cent.; fines, etc., as usual, for the period of 78 months. Bratton performed his part of the contract, and then stopped paying. The Association claimed that it could not make such a contract, because it was *ultra vires*, and "destroys the mutuality which must exist between the members of a Building and Loan Association."

Curia. "The doctrine of *ultra vires*, no matter how interpreted, is always 'ungracious and odious.' It is looked upon with disfavor by the courts, for it enables the corporation to repudiate its contracts, and take advantage of those who have dealt with it in good faith. *Prima facie*, all contracts of corporations, public or private, are valid, and it is incumbent on those who impeach them to show they are invalid.

Smith v. Board, 6 Ind. App., 153. 33 N. E., 243."

"It is the established rule of law in this State that where a

contract has been executed by a corporation, and *fully performed according to its terms,* by either of the parties to it, neither party will be permitted to say that the contract was not within the power of the corporation.

"Wright v. Hughes, 119 Ind., 324. 21 N. E., 907, etc.

"Arms Co. v. Barlow, 63 N. Y., 62. It was said by Mitchell, J., in Wright v. Hughes:

"The law never sustains the defense of *ultra vires* out of regard for the corporation. It does so only when the most persuasive considerations of public policy are involved. The contract was enforced."

(2) Sawyer v. Menominee Loan and Building Association, 61 N. W., (Mich., 1894,) p. 521.

Curia. "The taking of the stock and procuring the loan were all one transaction. James H. Walton was Secretary of the Association, and acted in the transaction in behalf of the defendant. Complainant claims that, before he subscribed for the stock, *Walton,* in setting forth the advantages to be gained by a borrower, among other things, *represented* that such borrower could pay a loan at any time, at the end of any quarter, and could settle on the basis of the loan's being *cancelled in eight years,* and at one-eighth thereof each year, taking the actual money loaned as a basis, and, so far as the settlement was concerned, disregard the premium bid for the loan. The *Secretary explained* that the Association could do this, because of the advantage it had in compounding interest monthly, and receiving interest on premiums and installments on premiums, and that the right to settle on this basis was plainly guaranteed by the By-Laws. Complainant claims that, *relying upon these representations,* he did *not examine the By-Laws,* but agreed to take a loan of $4,500, and subscribed for 45 shares of the capital stock of the Association, having bid for such stock 22½ per cent. premium."

After paying for 17 quarters, Sawyer decided to pay his loan on the terms represented to him by the Secretary. There was no "printed literature" here; only the verbal representations of the Secretary. Sawyer was refused, and he tendered the

money and filed his bill to have the bonds and mortgages cancelled.

Curia. "It is evident from all the testimony, that complainant took the loan in good faith, and in *full reliance* upon the interpretation given by the Secretary. . . . . If that interpretation had been adhered to by the Company, he could have settled at any time. We think *he is now entitled* to have the contract *construed in the light* of the By-Laws, *as they were represented* to be." . . . .

"Whether such misrepresentations were intended, or were mere matter of mistake, the *complainant has been misled, to his injury;* and the law is well settled in this State that it is immaterial whether a false representation is made innocently or fraudulently, if, by its means, the party is injured.

"Holcomb v. Noble, 69 Mich., 396. 37 N. W., 497.

"Totten v. Burhans, 91 Mich., 499. 51 N. W., 1119.

"We do not think that the rule laid down by the Court below, that the complainant *had the opportunity* to find out what the By-Law was, and *therefore could not complain,* if he did not protect himself, *can be sustained.* The parties were not standing on an equal footing. The secretary represented the company, and the complainant might well rely upon the interpretation of the by-laws which the secretary gave. Complainant did not see the by-laws. They *were not exhibited to him.* The secretary claimed to know what interpretation the company put upon them, and the complainant chose to rely upon such representation.

"The rule laid down by Lord Chelmsford, in Railway Co. v. Kisch, L. R., 2 H. L., 121, it seems to us, is specially applicable to the present case. It was there said: 'When once it is established that there has been any fraudulent misrepresentation, or wilful concealment, by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector. '*You, at least, who have stated what is untrue,* or have concealed the truth, *for the purpose of drawing me into a contract,* cannot

accuse me of a want of caution, because I relied *implicitly upon your fairness and honesty.'* "

Cf. National Savings Assn. v. Neely (Pa.) 46 Atl. p. 919.

The most recent work on Building and Loan Associations—that by Judge Thompson, in the 7th Volume of his monumental work on corporations, lays down the following, in Section 8756: "An arrangement for the repayment of loans, and withdrawal of members, different from the terms prescribed therefor, in the statute or charter, when wholly or partially executed, cannot, whether it be *ultra vires* or not, be rescinded or questioned by either party," with authorities.

So far as "the mutuality of members" of these associations is concerned; (that is, the partnership theory,) that was ended in England when Lord Ch. Selbourne for the House of Lords decided as to a Building and Loan Association.

"This is not a joint stock company, still less is it a common law partnership." * * *

"It is impossible in my view for the society to say that the instalments as received from time to time are not to be ascribed as payments to the advance. It is perfectly clear that they must be so ascribed."

Concurred in by the whole Court, Lords Bramwell, Watson and Fitzgerald sitting.

Brownlee v. Russell, H. L. Law Rep., 8 App. Cases, 248.

See also Tosh v. North British Building Society, following the above, Lords Herschell, Blackburn and Fitzgerald sitting.

House of Lords, Scotch, 11 App. Cases, 496.

And "in the State of South Carolina from the time of the decision of Bollinger's case (Association vs. Bollinger, 12 Rich. Eq., 124, 1860,) its Courts have held such a dealing as considered here (a member getting advances on his shares) was a loan, and not a partnership."

Pollock v. Association, 51 S. C., 424.

We beg to read the following from the decree in this case when first before the Supreme Court of South Carolina, 54 S. C., p. 593-594:

"It is a well known fact that comparatively few people who become shareholders in such Associations are familiar with their by-laws. They rely upon the honesty, integrity and fair dealing of those who manage the affairs of the Association. It is also a well known fact that the by-laws are frequently intricate and almost unintelligible to the average shareholder, and that those in charge of the affairs of the Association usually become exceedingly expert in the interpretation of them, thus giving the Association a decided advantage in the way of information over the shareholders. Public policy, in order to prevent the perpetration of fraud, and to prevent just such a case as we now have before us, in which the plaintiff alleges that he was induced by the express promises and the literature of the defendant to part with his money, in purchasing its shares of stock, demands that the defendant should not be allowed to elect whether it will be bound by its by-laws, or its express agreement, as to the time when the shares would mature. * * * This court has the right, therefore, to construe the circular. It unquestionably shows that the defendant interpreted the contract to mean that the shares would *mature at a fixed and definite period.* It is a well settled principle that when the construction to be given a contract is rendered doubtful by the language thereof, the interpretation of the contract by the parties themselves is entitled to great weight. Chicago v. Sheldon, 9 Wall., 50; Railroad Co. v. Trimble, 10 Wall., 367; Steinback v. Stewart, 11 Wall., 566; Lowber v. Bangs, 2 Wall., 728. Our conclusion as to the proper construction *of the contract is in harmony with the interpretation placed upon it by the defendant,* and this is an additional reason why the by-laws should not prevail against the express agreement fixing the time when the shares would mature."

Cf. The recent insurance case (6 June, 1902,) of Home Savings Inst. vs. Noblesville, &c, Church. 64 N. E., 479.

A contract for the loan to the defendant having been made

innocently by both parties, the ordinary bond and mortgage, differing from the agreement, were executed; it was held "*fraud*" in the Association to set up and insist on such bond and mortgage.

See Wagner, &c., Assn. vs. Skelton (Ind.) 61 N. E., p. 951, showing that while as a rule shares mature only when they reach the par value, and

Assn. vs. Bratton, (Ind.,) 56 N. E., p.167.

Assn. vs. Wagner, (Ind.,) 23 N. E., 689.

that if a specified number of payments is named, the bond and mortgage are extinguished on such payments, and Hartman vs. International B. & L. Assn., (Ind.,) 62 N. E., p. 6, that this is the rule also where the "representation" of the agent of the association as to such payments is false.

Though not strictly applicable to this case, attention is called to the Eastern B. & L. Assn. vs. Welling, 181 U. S., p. 48. There the question raised in this case, was decided against that association because raised too late, but the remarks of the Court are significant.

Loan of $937.70 on the Stock as Collateral.

The history of this transaction is free from doubt. Williamson's testimony as to the facts is nowhere contradicted.

In 1895, Carpenter, the special agent of the Association, induced Williamson to borrow on his stock as collateral $937.50, assuring him "that by so doing that I (Williamson) would be borrowing from the Association as from a bank, and that it would *not alter my* status as a shareholder" (s. p. 22-23).

To clinch this assurance, Williamson wrote to the General Manager (Pooler) of the Association, at Syracuse, N. Y., on 16th April, 1895, as follows:

"As I understand this contract, I may pay up the principal sum at any time, and the monthly payments of $6.25 will then be discontinued, and *my stock will be just as it is now to me.*" (s. p. 23.)

To which, on 19th April, 1895, Pooler replies:

"Your esteemed favor of 16th inst. came duly to hand . . your understanding is correct with reference to the payment of principal, and discontinuance thereafter of interest upon the loan. As I desire this to catch the first Eastern mail, I must reasonably be brief." (s. p. 23.)

Ambiguous perhaps, and showing the same intentional fraud, and deliberate and ingenious deceit that has invariably characterized the Association and its officers, but with every honest man, assenting to everything said by Williamson.

"If he (defendant) resorts to unlawful means, and accomplishes a fraudulent purpose, the law will not stop to measure the force of such inducements. It is enough that the party was deceived and cheated, and the defendant's falsehood and fraudulent practices contributed to that end."

James vs. Hodsden, 47 Vt., 137.

With what has been said before on the subject of misrepresentation, we may dismiss this matter. It only shows the object the Association wished to gain by its deceitfully inducing Williamson to take a useless loan. He was the President of the Bank in Darlington, (s. p. 19) and could get such loans as he needed from it. So these loans and the investment in its stock of the Association must be made specially attractive to him to gain him as a customer. He carried no doubt financially great weight in Darlington, and his subscription and his borrowing would doubtless lead many others to follow his example.

So promises are made freely—promises intentionally false—deliberately repeated with no intention of keeping them; till Williamson has served their purpose of bait, and then they turn on him.

Waiver.

Did Williamson waive his right to have his stock mature on 1st August, 1897, on 78 payments, as printed on the certificate

of stock issued to him (s. p. 25-26), when he borrowed the $937.50 in 1895?

"A waiver must be an *intentional* act with *knowledge.*"

Darnley vs. London, etc., Ry. Co., L. Rep., 2 H. L., 57.

"A waiver of a stipulation in an agreement must, to be effectual, not only be made *intentionally,* but with knowledge of the circumstances."

Bennecke vs. Conn. Mutual L. Ins. Co., 105 U. S., 359.

"Waiver is usually a question of intent; and knowledge of the right and *intent* to waive it must be made to appear *plainly.*"

28 Am. and Eng. Encyc. of Law, p. 528.

"A man does not lose his rights without *intention,* or facts fairly equivalent to *intention.*"

Bigelow Estoppel, Ed. 1890, p. 663.

The only *intention* of Williamson is to be found in his uncontradicted testimony that he would not borrow the $937.50 until assured that it would not affect his stock. The special agent of the Association had assured him that it would be "just as if I was borrowing from a bank, and that it would not alter my status as a shareholder." (s., p. 22, 23, 24.

And in his letter of 16th April, 1895, to the Association, Syracuse, N. Y.: "As I understand this contract, I may pay up the principal sum at any time * and (then) my stock will be just as it is to me." (s. p. 23).

The answer to this by Pooler, General Manager of the Association, says: "Your understanding is correct." (s. p 23.) If written honestly, it can only apply to the entire note of Williamson. If written as a trap to catch Williamson, as a deliberate deceit and a premeditated fraud, it may perhaps be restricted to "the payment of principal and discontinuance of interest." But with the previous assurances of Carpenter, and the apology of Pooler, for being "necessarily brief," Williamson, and no honest man could have understood it except as applying to his whole note.

And so the jury of Darlington as honest men have interpreted it, and it was a *question for the jury.*

"Whether it (a right) has been waived in a given case is *entirely* a matter of *intention*." "And there was no error in the Judge submitting it to the jury as a *question of fact*."

Hammond vs. Rd. Co., 15 S. C., 35.

Has Williamson's contract been varied by the change of the By-Laws of the Association?

The By-Laws in existence when Williamson became a member, and printed on the back of his stock, provides (s. p. 48) that any member so wishing can withdraw his stock.

The amended act of incorporation adopted 1894 limits the right to shares which are not pledged (s. p. 89)

Can this apply to Williamson's shares? Unless expressly declared retroactive, laws are not such.

1 Thompson's Corporations, Section 1010.

Knights Templars vs. Jarman, (C. C. A.) 104 Fed., 643.

Nor can they, even if declared retroactive, disturb vested rights.

Ib., Section 1019.

Ib., Section 8757.

Even where the charter gives the right to alter, amend and repeal its By-Laws, it cannot do this so as to impair rights vested under it.

Ib., Section 1019.

Ib., Section 8737.

Citing Kent vs. Quicksilver Mining Co., 78 N. Y., 159.

Cf. Knights Templars vs. Jarman (C. C. A.) 104 Fed., 643.

Cf. Vestry vs. Matthews, 4 DeS. 585.

Palmetto Lodge vs. Hubbell, 2 Strob., 463.

Association vs. Bollinger, 12 Rich. Eq., 136.

A. and E. Enc. of Law Vol. 4 (2nd Ed.) 1019, notes.

Supreme Council, &c., vs. Getz, 112 Fed. Rep. 119.

There is nothing in the Amended Laws which gives the slightest intimation that they were intended to be retroactive.

Further :

A look through the sections concerned will make it manifest that the word *withdrawal* is applicable only to members retiring from the Association *before* the maturity of their shares. This privilege is accorded, it is true, only to unpledged shares, but it does not affect or concern shares *that have matured.* These, under the contract, when once matured, must be redeemed. They no longer depend on a privilege, allowing a withdrawal from the contract on terms before its completion; but stand on their contract giving them the right to be settled with, when they have done all required of them. It is true that pledged shares could not be withdrawn *before maturity;* but it is not true that pledged shares, that have reached maturity, have not the right to demand payment of the contract value of their shares, less the amount of any loan on the same. This is perfectly evident from the language of Article XII of the Charter and By-Laws of 1890, which reads : "Shares which are not pledged, may be withdrawn *before maturity,* provided the same are in good standing, and all dues and fines have been paid to date."

The CHARGE of Judge Klugh fairly and clearly submitted these questions of fact to the jury.

(1) Did the defendant Association agree with Williamson "that upon the payment by him of these 78 instalments, together with the membership fee, it would then repay to him the full amount of $100 upon each and every of the said shares of stock ? " (s. p. 132-133-134.)

The jury answered : Yes.

(2) Did Williamson pay these amounts ?—"perform all the conditions ? " (s. p. 132-134.)

The jury answered : Yes.

(3) Did Williamson borrow from the Association subsequently $937.50, "under a distinct and definite agreement with the defendant?" Did Williamson pay all the charges, interest, etc., on this loan, so that now these $937.50 should be set off against the $2,500 due to Williamson? (s. p. 132-137.)

The jury answered: Yes.

(4) Was Williamson's contract with the Association, that he "should keep on paying until, by the books of the Association, or in some other way—whatever way the Association reached the conclusion—until the shares should arrive at the value of $100 each?" (s. p. 133.)

The jury answered: No.

(5) Did the Association, by literature, written or printed representations, or by verbal representations, induce Williamson to enter into this contract? Did it induce Williamson to believe that it was a contract for a limited number of payments?

The jury answered: Yes.

(6) Judge Klugh then makes the only real ruling on law contained in his charge, and that is in accordance with the previous decree of this Court in this case, viz:

"The principle of *ultra vires* cannot enter in this case."

The jury, of course, did not pass on this. (s. p. 135.)

(7) Did Williamson waive the provisions of his original contract, when he made the subsequent loan of $937.50 from the Association?

The jury answered: No.

The point of law, ruled in connection with this point, that the defendant must prove the waiver by the preponderating weight of evidence (s. p. 136) is so self-evident, that it hardly should be called a *ruling* on a law point.

We submit that the verdict of the jury can only be understood as above. If so, then all the questions of fact have been definitely and irrevocably settled.

H. E. YOUNG,
For Defendant in Error.

Charleston, S. C., 1st November, 1902.

And "findings of fact by the State Courts are, on a writ of error, conclusive with us."
Jenkins v. Neff. 186 U. S. 23.

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JAMES H. McKENNEY,
Clerk.

152

EASTERN BUILDING AND LOAN ASSOCIATION,
of Syracuse, N. Y., Plaintiff in Error,

v.

BRIGHT WILLIAMSON, Defendant in Error.

Since the printing of the argument of the defendant in error, there has appeared the case of Vought v. Eastern Building and Loan Association, of Syracuse, N. Y., decided in the Court of Appeals of New York, on 2nd December, 1902.

Published 65 N. E. Rep., 2d January, 1903.

HEAD NOTE.

"1. A certificate of a building association provided that in consideration of the membership fee, the agreements in the application for membership, and compliance with the conditions and by-laws printed on the certificate, the association would pay $100 for each of the shares held by a member 78 months after the date of the certificate; the amount of monthly installments and the maturity of the certificate being fixed by the indorsement on the back thereof. *Held*, that the holder of the certificate on maturity, the installments having been duly paid, is entitled to the par value of each share of stock held under such certificate.

"2. The conditions and by-laws of a building association, printed on the certificate and made a part of the contract of membership, provided that the shareholder should pay 75 cents a month on each share until it matured, or was withdrawn; that shareholders should pay monthly 75 cents a share until the same should be fully paid,—the amount to be paid at maturity of the shares to the shareholders being $100 per share, and the profits to be apportioned among the shareholders, and no money to be withdrawn from the loan fund except for the making of loans on good security. *Held*, that such provisions were not incon-

sistent with the promise to pay the amount named in the certificate, so as to show that such payments were to be made only in the event that there had been paid a sum upon the shares held under the certificate which, with the profits apportioned thereto, would amount to its face value.

"3. A provision contained in a certificate of membership in a building association that no money should be drawn from the loan fund except to make loans on security, and to pay amounts due withdrawing shareholders, does not prevent the payment of an amount called for by the certificate on its maturity; the term "withdrawing stockholders" meaning those who withdraw at the maturity of their certificate, or afterwards, as well as those withdrawing before the maturity thereof.

4. Omitted, as not pertinent.

"5. In an action by a member in a building association on his matured certificate, it is no defense that defendant was unauthorized by the statute under which it was organized to make a contract to pay a fixed sum thereon at the maturity of the certificate, where the contract was made in good faith, and was fully performed by the member, and the building association had the benefit of such performance.

This case renders further argument unnecessary, as the Court of Appeals of New York, though on different grounds, has decided exactly as the Supreme Court of South Carolina. The South Carolina Court has not refused to "give full faith and effect to the * * judicial proceedings of the State of New York," but the decisions of both States are in exact conformity, both made as to the same party—The Eastern Building and Loan Association, of Syracuse, N. Y—fixing its rights and liabilities in exactly the same way.

H. E. YOUNG,
For Defendant in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 152.

EASTERN BUILDING AND LOAN ASSOCIATION, OF SYRACUSE, N. Y., Plaintiff in Error,

vs.

BRIGHT WILLIAMSON, Defendant, in Error.

In Error to the Supreme Court of South Carolina.

REJOINDER OF THE DEFENDANT IN ERROR TO THE SUPPLEMENTAL AND REPLY BRIEF FOR PLAINTIFF IN ERROR.

H. E. YOUNG,
Counsel for Defendant in Error.

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"REPLY I. Page 1." VOUGHT'S CASE.

Plaintiff in error seeks to differentiate this case from Williamson's, on the ground that Williamson became a borrower in 1894. Vought's case, the New York Court says, is "under the provisions of Chapter 122, of the Laws of 1851, and the Statutes *amendatory* thereof and *supplemental* thereto," and its

decision is in regard to all these. The same is true of Williamson's case. Further, the fact of his having borrowed money makes no difference, as he borrowed on the assurance from the Association's officers, that :

"It will not alter my status as a shareholder." "My stock will be just as it is now." (s. p. Record, 22, 23.)

And yet further, there is no evidence that the amended "articles" were ever served on Williamson, or ever brought to his notice.

We beg simply to recall these facts. The case speaks for itself. Counsel for the plaintiff in error wishes the Supreme Court to shut its eyes to the case, "even though it takes judicial notice of the statutes and jurisprudence of the States."

Greenleaf Evidence, paragraph 6.

" REPLY III. Page 9."

The testimony as to the representations—"the literature" —as constituting a part of the contract in this case, was introduced over the objection (which, however, did not apply to its admissibility *per se,*) of the plaintiff in error. (Record, s. p. 15-18.)And the court submitted to the jury the consideration of this "literature." (s. p. 184.)

On appeal to the Supreme Court of South Carolina, the admission of this "literature," and of its submission to the jury as a part of the contract, is not appealed from. On the contrary, in the 12th request to charge of the plaintiff in error, (Record, s. p. 142,) its admissibility is practically conceded. There is no assignment of error on this point, in this Court. Whether Judge Klugh decided correctly or not, still his decision is now the law of this case, and cannot, under the 21st rule of this Court, be considered.

Murdock v. Memphis, 20 Wall., 590.

But further it is not a Federal question.

Even if this "literature" cannot be considered an evidence of fraud, it certainly constitutes an estoppel in pais, and this need not be pleaded.

Bigelow Estoppel, p. 699, note 1.

And even if Judge Klugh had improperly admitted it, yet "where an estoppel in pais is not properly pleaded, but on the trial evidence is introduced without objection, the objection to the pleading will be deemed waived, and the case will be considered as though the estoppel had been properly pleaded."

2 Estee's Pleading, par. 3772.

"REPLY V. Page 10." RES JUDICATA.

Counsel for defendant in error admits that in his opinion the decision of the Supreme Court of South Carolina in so far as the Supreme Court of the United States is concerned, is not, *per se,* res judicata, because as it left open the question of waiver, it was not a final decree.

But the record of the former case (Record, s. p. 13,) is in evidence. "The brief in the case was then introduced," means in South Carolina the entire record, with complaint and all other pleadings, and all decrees, orders, etc. (Rules Sup. Ct. So. Ca., V, p. 264, Code 1902.) There is no appeal from its admission. It is not printed at length, but it is fully set out by the present decree of the State Supreme Court. (s. p. 144-146.) I presume that this induced Messrs. Brown and Spain, who managed the case for the defendant and plaintiff in error respectively, in Darlington, not to burden this record with the case.

But referring to the case it will be seen that the ground for resisting Williamson's attachment was that he had *no cause* of action, and thus all these questions came up, and were fully argued. (s. p. 146.)

Burrill vs. Letson, which had helped to make Mr. Petigru's great reputation, and which had established the law in South Carolina for over half a century, was held no longer applicable, on account of the change of statutes on the subject, and the case decided against the plaintiff in error.

Again, however, we submit that inasmuch as this part of the present decree of the Supreme Court of South Carolina is not assigned as error, it also becomes the law of this case, and cannot, except under the 21st Rule of this Court, be re-argued.

Lastly. That suit must be brought in Onondaga, N. Y., in six months. This point was not before the Circuit Court—not being ruled on—nor before the Supreme Court of South Carolina—not being a ground of appeal—nor is it assigned as error to the Supreme Court of the United States.

Consequently it also is not before this Court.

A point not brought to the attention of the Judge below, and not ruled upon, is not before this Court. (Supreme Court of S. C.)

Hyne vs. Erwin, 25 S. C., 232.

This Court (Supreme Court of U. S.) will not, and cannot consider points *not shown* to have been made in the Court below, or in the exceptions to the judgment appealed from.

Rule XXI, Section 4. Stevenson vs. Barbour, 140 U. S., 48; 2nd Foster, 1076.

The other matters have already been noticed.

H. E. YOUNG,
Counsel for Defendant in Error.